No. 12937

United States
COURT OF APPEALS
for the Ninth Circuit

MARYLAND CASUALTY COMPANY, a corporation,
Appellant,

vs.

SIDNEY F. PATON and LOIS ELEANOR PATON,
Doing Business as PARAMOUNT SERVICE,
Appellees.

APPELLEES' BRIEF

Upon Appeal from the District Court of the United States for the District of Oregon.

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JURISDICTION

This is a civil action. Plaintiff is a corporation organized under the laws of the State of Maryland (Tr. 29). Defendants are citizens of the State of California (Tr. 29). The amount involved in this controversy is $6,-

300.00 (Tr. 32). Jurisdiction of the United States District Court is based upon 28 U.S.C.A., Section 1332.

The Judgment Order was a final decision in the District Court, a review of which may not be had in the Supreme Court under 28 U.S.C.A., Section 1252-1253.

SUMMARY OF ARGUMENT

The questions raised in the lower court and decided in favor of the appellees were:

(1) Does the Complaint state a claim against the defendants upon which relief can be granted?

(2) Was the action coming within the period provided by the Statute of Limitations?

It is well to note to begin with that Appellant disclaims any attempt to come under the Oregon Wrongful Death Statute (Sec. 8-903 Oregon Compiled Laws Annoted).

> *"Action by personal representative for wrongful death: Limitations: Amount recoverable.* When the death of a person is caused by the wrongful act or omission of another, the personal representatives of the former for the benefit of the widow or widower and dependents and in case there is no widow or widower, or surviving dependents, then for the benefit of the estate of the deceased may maintain an action at law therefor against the latter, if the former might have maintained an action, had he lived, against the latter, for an injury done by the same act or omission. Such action shall be commenced within two years after the death, and damages therein shall not exceed $10,000."

Appellant disclaims any attempt to base its claim upon subrogation to a cause of action which accrued to James Buie or the widow of James Buie or the estate of James Buie. Appellant bases its claim on two possible cause of action. One of these they contend arises by virtue of the statutes of the State of California and the other arises by what they describe as a right of indemnity.

For purposes of this brief, Appellees will follow the argument of Appellant as set forth in its brief. The burden of sustaining its cause of action in view of the challenge by defendants in the lower court rests upon Appellant. Appellant must carry the burden of proving that the claim set forth in the Complaint is one upon which relief can be granted.

A. Appellant's Contention That It Has a Right to Recover Under the California Labor Code.

Appellees make no contention that the sections of the California Labor Code which are set forth in Appellant's brief would not apply if the accident with which we are concerned had occurred in California, but for reasons that will be set forth later, Appellees contend that the statutes in California can have no extraterritorial effect and do not create in Appellant a cause of action arising from an accident which occurred in the State of Oregon.

The Workmen's Compensation laws of about all of the states have provisions by which either the employer, his insurance company or a state fund, as the case may

be, may be reimbursed partially or in full for compensation payments made for injuries caused by the negligence of a third party. See Wright, "Subrogation Under Workmen's Compensation Acts" (1948) Sec. 1.

Hardly any two of the Workmen's Compensation Laws of the various states are alike and the provisions by which the employer, his insurance company or the state fund may be reimbursed from a third party wrongdoer are even more varied. Some provide that the payment of compensation has no effect on the employees cause of action and that the employee can still sue the third party; some use a subrogation or assignment arrangement; some provide for an election by the employee. To hold that a tort committed in Oregon is not only subject to the liability created by the laws of the State of Oregon, but also by liability created in any one of the other forty-seven states and in addition the territories of the United States, illustrates the extremes to which Appellant goes in an attempt to sustain its cause of action.

The foregoing likewise applies to the decision set forth by the appellant in which the California Court has interpreted the California Workmen's Compensation Law. If this accident had occurred in California, the provisions of the California Labor Code and the decisions of the California Courts in interpreting the California Labor Code would be binding on the parties in this accident.

We call the Court's attention to the case of *Personius vs. Asbury Transportation Company,* 152 Oregon 286,

53 P. (2d) 1065, (1936). In this case the plaintiff, while operating a motor stage, was injured when the motor stage collided with a truck operated by defendant. The accident occurred in Oregon, but plaintiff's contract of employment was made in Idaho. Under the provisions of the Idaho act, plaintiff was entitled to compensation because his contract of employment was entered into in Idaho. He made claim for his compensation and received an award. He then brought this action against the wrongdoer. The defendant attempted to plead by way of defense the fact that compensation was paid in Idaho and the cause of action thereby was assigned to the employer by virtue of the law of Idaho.

The Court uses the following language:

> "The law of Idaho granting to the employer the right to maintain in his own name an action to recover for injuries inflicted on his employee by a third party, if such a construction can be given to the Idaho statute, is not controlling here. The supreme court of Idaho has not construed the word 'subrogation', appearing in that statute, as equivalent to, and meaning the same thing as, an absolute assignment. Nor has it held that an injured workman, after receiving compensation under the act, is precluded from maintaining an action of this nature.
>
> "It may be conceded for the purposes of this opinion that the state of Idaho 'has the power to forbid its own courts to give any other form of relief for such injury' than prescribed by its workmen's compensation act: *Alaska Packers Ass'n v. Industrial Accident Commission,* 294 U.S. 532 (79 L. Ed. 1044, 55 S. Ct. 518). *The prohibition imposed on the Idaho courts has no extraterritorial effect on the courts of this state.*" 152 Ore. 286, 309, 53 P. (2d) 1065, 1075. (Italics ours.)

Appellant contends that the recent trend of decisions involving Workmen's Compensation laws is to give them extraterritorial effect. It feels that the California law was given extraterritorial effect by the mere award of compensation made to the widow of James Buie. It takes no great discernment to realize that the liability for compensation did not arise because the California act has extraterritorial effect, but merely because the contract of employment between James Buie and the Quaker Pacific Rubber Company was entered into in the State of California and the California Labor Code covers the relationship between employers and employees in all cases when the contract of employment is made in the State of California.

Deering's California Codes, Labor Code (1937):

> "§ 5305. CONTROVERSIES ARISING OUT OF INJURIES SUFFERED OUTSIDE STATE: RIGHT TO COMPENSATION OR DEATH BENEFITS. The commission has jurisdiction over all controversies arising out of injuries suffered without the territorial limits of this State in those cases where the injured employee is a resident of this State at the time of the injury and the contract of hire was made in this State. Any such employee or his dependents shall be entitled to the compensation or death benefits provided by this division."

In the case of *Sloan vs. Appalachian Power Electric Company,* 27 F. Supp. 108, cited by Appellant on Page 16 of its brief, the act of Kentucky was not given extraterritorial effect, but rather, the court held that Sloan, by applying for and receiving compensation in Kentucky, entered into a contract concerning any right he

might have had against a third party wrongdoer. The court merely gives effect to that contract. The case does not hold that the insurance carrier has a cause of action in West Virginia, but merely holds that Sloan has contracted away some of his rights. As the court says on Page 109 (which is also cited on Page 17 of Appellant's Brief):

> "It is true that the law of West Virginia, where the accident occurred, determines the question of negligence, but the law of Kentucky determines the rights of the parties under plaintiff's contract of employment. The contract of employment was entered into in Kentucky, and the provisions of the Kentucky Compensation Act became a part of that contract of employment, so that the insurance company's right of subrogation is not only statutory but contractual." 27 F. Supp. 108, 109.

The same applies to the case of *Biddy vs. Blue Bird Air Service,* 374 Ill. 506, 30 N.E. (2d) 14 (1940). In this case the court is not giving extraterritorial effect to the statute of another state to create a cause of action, but rather, it holds that the widow by contract divested herself of part of her cause of action and created in her deceased husband's employer part of the cause of action she has under the laws of the State of Illinois. The court in this case quotes from the case of *Bradford Electric Light Co. v. Clapper,* 286 U.S. 145, 52 S. Ct. 571, 76 L. Ed. 1026. This is quoted by Appellant in its brief on Page 18 and is as follows:

> " * * * In the Clapper case, the court, in considering the extraterritorial effect to be given the Workmen's Compensation Act of one State by the courts of another under the full faith and credit

clause, said: 'The mere recognition by the courts of one state that parties by their conduct have subjected themselves to certain obligations arising under the law of another state is not to be deemed an extraterritorial application of the law of the state creating the obligation.' " 30 N.E. (2d) 14, 17-18, 374 Ill. 506, 512.

These cases and other similar cases do not give the Workmen's Compensation Act of one state extraterritorial effect in creating a new cause of action, but merely hold that a person who by contract makes himself subject to the Workmen's Compensation Act in one state cannot avoid the obligations by bringing an action in another state.

B. Appellant's Contention That It Has a Common Law Right of Indemnity.

In addition to a cause of action which Appellant contends it has on the basis of the legislation of California and the decisions of the California courts, Appellant contends that it has a cause of action arising from the common law right of indemnity. Appellant relies heavily upon two cases. *Travelers' Insurance Co. vs. Great Lakes Engineering Works Co.,* (6th C.C.C., 1911) 184 Fed. 426, and *Staples, et al. vs. Central Surety and Ins. Corporation, et al.* (10th C.C.A., 1922) 62 F. 2d 650. In view of Appellant's heavy reliance upon these two cases, careful scrutiny of them should be made.

In the Great Lakes Engineering Works Co. case we have a situation entirely different from our present case and Appellant, in its brief notes this difference. The en-

gineering company did some boiler work for the brewing company which we can assume was defective. The boiler exploded, killing one employee of the brewing company and injuring another. Travelers' Insurance Company, the compensation carrier for the brewing company paid compensation and brought the action against the engineering company. The lower court sustained the Demurrer of the defendant. The Circuit Court of Appeals held that the Complaint stated sufficient facts for a cause of action and remanded the case to the District Court for trial.

To begin with, the Circuit Court noted the relationship between the engineering company and the brewing company and the important part this relationship played in the existence of the cause of action. The court stated:

> "It is to be remarked, in passing, that the question whether the relation of the engineering company toward the brewing company was or was not in fact that of independent contractor is, of course, open for determination upon the evidence as it shall appear upon the trial." 184 Fed. 426, 429.

The court further stated:

> " * * * It is a general rule of law that a principal or employer is civilly responsible for wrongs committed by his agent or servant while acting within the scope of the employment of the agent or servant. I Thompson on Negligence, §§ 518, 520, 526. The rule of law is likewise general that where a principal or employer is not in fault, but has nevertheless been compelled to pay damages to a third person for the negligence of his agent or employee, he may maintain an action over against such servant or employee to recover what he has

been compelled to pay. Story on Agency (9th Ed.) § 217; 4 Thompson on Negligence, § 3870. The brewing company thus had, by virtue of its alleged relations with the engineering company, a right of action over against the latter for negligence on its part which caused legal damage to the brewing company. The injury to the brewing company resulting from that negligence was direct and immediate." 181 Fed. 426, 431.

Finally on Page 431 of the opinion the court states:

" * * * The ground of the recovery sought is that the engineering company failed in its primary and positive duty toward the brewing company, whereby the latter company sustained a loss." 184 Fed. 426, 431.

It can thus be seen that in this case relied on by the Appellant, we have a situation entirely different from the case with which we are concerned. There was a contractual relationship between the engineering company and the brewing company. There was an installation by the engineering company of mechanical equipment for the brewing company and as a result of this contractual relationship there arose between the engineering company and the brewing company certain duties. It was for a determination of the liability and obligations connected with this relationship that the Circuit Court remanded the case to the District Court. In the instant case, there can be no contention that any relationship existed between Pacific Quaker Rubber Co., the employer of the deceased, and the Appellees and there consequently could be no breach of any duty because in fact no duty existed between Appellees and Pacific Quaker Rubber Co.

The next case relied upon by Appellant is the case of *Staples, et al. vs. Central Surety and Insurance Co., et al.,* 62 Fed. 2d 650 (10 C.C.A. 1932). Appellees feel that by relying on cases similar to the Great Lakes Engineering Co. case and other cases wherein a relationship existed between the wrongdoer and the party seeking to recover on the basis of indemnity, the court arrived at an erroneous decision. Appellees contend that an examination of the authorities cited by the court in its opinion will reveal that the cases are either cases involving statutory or contractual subrogation, assignment, or cases wherein a duty was owed by the wrongdoer under the common law of negligence and that the court erred in its holding that under the facts of the case Central Surety and Insurance Corporation was entitled to recover against Staples.

A well-reasoned opinion and one which Appellees think is of great help in understanding the questions raised by the Appellant in this case and the error made in the Staples case is the case of *Crab Orchard Improvement Co. vs. Chesapeake & Ohio Railway Co.,* 115 Fed. 2d 277 (4th C.C.A. 1940). In this case an employee of the plaintiff, Crab Orchard Improvement Co., was killed in the course of his employment by the alleged negligence of the defendant railway company. Under the compensation law of West Virginia, where the accident occurred, plaintiff was required to pay into a state fund the sum of $4,000.00. Plaintiff further alleged that due to an increase in premium, it was additionally damaged in the sum of $11,000.00. An action was brought against the railway company alleging damages in the sum of $15,-

000.00. On the motion of defendant, the action was dismissed by the District Court of the United States for the Southern District of West Virginia. The question raised in the District Court and the contentions of the appellant on the appeal are set forth in the opinion as follows:

> "As the District Court stated (33 F. Supp. at page 582): 'The question presented in this case is whether an employer who has been forced to pay compensation or death benefits to the dependents of one of its employees who was killed in the course of his employment as a result of the negligence of a third party, may recover the amount so paid, through no fault of its own, from the negligent third party, in the absence of any provision for subrogation or assignment in the Compensation Act by virtue of which the payments were made.'
>
> "As we view the appellant's theory of the case, there are three specific phases to this question: (1) Has the employer a common-law right of subrogation against the third party tort-feasor? (2) Has the employer a quasi-contractual action for indemnity against the tort-feasor? (3) Has the tort-feasor, by his negligent injury of the employee, breached a legal duty owed to the employer, so as to give rise to a civil action?" 115 F. 2d 277, 279.

Under the laws of West Virginia, no subrogation is given to the employer on account of payments to the State Fund. In our instant case, Maryland Casualty Company disclaims any attempt to base its action upon a right of subrogation; so, consequently, the court's opinion in the Crab Orchard Improvement Company case on Question (1) is of no concern here.

On the question of subrogation, however, the court makes the following comment concerning the Travelers'

Insurance Company vs. Great Lakes Engineering Works case:

> "Before we leave the doctrine of subrogation, mention should be made of the case of Travelers' Ins. Co. v. Great Lakes Engineering Works Co., 6 Cir., 1911, 184 F. 426, 36 L.R.A., N.S., 60. That case, we think, was really decided on principles of agency; but, insofar as it supports the application of the doctrine of subrogation to the factual situation under discussion we do not feel obligated to follow it." 115 F. 2d 277, 281.

The court then takes up the question of whether the Crab Orchard Co. has an action against the wrongdoer based on indemnity:

> "(11, 12) We next consider that phase of appellant's theory which deals with the principle of indemnity. This principle is closely interrelated with the principle of subrogation, and oftentimes, the possessor of the one right is also the possessor of the other. Cf. Restatement of Restitution § 76g. In any event, much of what has been said in reference to the doctrine of subrogation, as here considered, will apply with equal force to the doctrine of indemnity. A broad definition of indemnity is offered in section 76 of the Restatement of Restitution: 'A person who, in whole or in part, has discharged a duty which is owed by him but which as between himself and another should have been discharged by the other, is entitled to indemnity from the other, unless the payor is barred by the wrongful nature of his conduct.' A scanning of this definition reveals that the indemnity principle is more limited in application than that of subrogation. Not only must a benefit be conferred upon the defendant by a discharge of his duty or obligation, but the discharge must have occurred under circumstances in which the plaintiff was, at the same time, discharging a

personal obligation coextensive with that of the defendant.

"(13) We think that there is no factual basis here which justifies indemnification. As has been pointed out above, the third party tort-feasor receives no benefit by the employer's payment under the Act. Furthermore, as the duty and obligation of the employer are different and distinct from the duty and obligation of the third party tort-feasor, the requisites for the application of the indemnity principles are not met. A similar conclusion was reached in McCullough v. John B. Varick Co., supra, 10 A. 2d at page 247:

> " 'Normally the right to indemnity arises only when there has been a discharge by one person of a duty also owed by another. * * *
>
> " 'Clearly this is not a case for indemnity within the principles thus stated. The duty of an employer to pay compensation under the statute is entirely separate and distinct from the duty of a third person to pay damages to a servant for personal injuries caused by his negligence. * * *
>
> " 'We, therefore, conclude that the essential legal obligations from which a right to indemnity may arise, are lacking in the present case.'

"If a contrary conclusion were reached, the result would be to impose upon the appellee a double liability, which would require it to pay both damages at common law for the injury to the employee, and also the amount of compensation already paid by the appellant.

" * * * Staples v. Central Surety & Insur. Corp., 10 Cir., 1932, 62 F. 2d 650, 653, held that under the Oklahoma Compensation Law the employer, as a result of the negligence of the tort-feasors, ' * * * had a cause of action, in his own right, for indemnity against appellants (tort-feas-

ors), at common law entirely independent of any provisions of the Compensation Law * * * .' The court reached this conclusion by regarding compensation under Workmen's Compensation Acts as analogous to property or indemnity insurance. 62 F. 2d at page 654. In this view, we believe that the learned court fell into error. We have already stated our reasons for preferring the closer analogy of Workmen's Compensation Acts to life and accident insurance." 115 F. 2d 277, 282.

In answering the third question raised by the Crab Orchard Improvement Co., the court stated:

"(14) (15) Appellant proceeds upon the final theory that appellee breached a legal duty owed to appellant, and that this breach is actionable. This theory predicates appellee's liability to the appellant on the ordinary principle of tort-liability—that appellee's negligence was the proximate cause, in a chain of causation, resulting in damage to the appellant. The courts, however, have quite uniformly treated such damages as too remote and too indirect to support a recovery. (citations) No legal duty is here owed by the tort-feasor to the employer." 115 F. 2d 277, 282-283.

Two of the cases cited by appellant in our present case were cited to the court in this case. Concerning them the court makes the following observation:

"Appellant cites many cases to support his views. E. g., George A. Fuller Co. v. Otis Elevator Co., 1918, 245 U.S. 489, 38 S. Ct. 180, 62 L. Ed. 422; Washington Gas Light Co. v. District of Columbia, 1896, 161 U.S. 316, 16 S. Ct. 564, 40 L. Ed. 712; The No. 34 (L. Boyer's Sons Co.), 2 Cir., 1928, 25 F. 2d 602; Pennsylvania Steel Co. v. Washington & Berkeley Bridge Co., D. C. N.D.W.Va. 1912, 194 F. 1011. But these cases are distinguishable. In each of them, the parties seeking indemnity either dis-

> charged an obligation for which the defendant was primarily responsible to the injured person, or there existed a contractual or a substantially similar legal relationship between plaintiff and defendant, or else there was a direct breach of a legal duty owed by the defendant to the party seeking indemnity." 115 F. 2d 277, 283.

The opinion concludes with an observation by the court that appropriate legislation is the means for creating in the employer or his insurer the rights which appellant is here seeking to create and enforce:

> "Accordingly, in the absence of appropriate legislative action, we must follow the apposite rules and principles of the common law. Under the application of these rules and principles to the instant case, the appellant, we believe, is not entitled to the relief that it seeks." 115 F. 2d 277, 283.

A careful reading of the Crab Orchard Improvement Company case will, we think, impress the court with the soundness of the decision. Judge Dobie has made a careful analysis of the previous decisions in the matter and the conclusion reached is one that will withstand a careful scrutiny. It should be noted that this case was decided in 1940, whereas the Staples case was decided in 1922. The trend of the law which appellant contends was started with the Great Lakes Engineering Works Company case in 1911 and brought to fruition in the Staples case in 1922, was not followed some eighteen years later. Finally, it should be observed that the Crab Orchard Improvement Company case was denied certiorari by the Supreme Court of the United States, 312 U.S. 702, 85 L. Ed. 1135, 61 Sup. Ct. 807.

The Crab Orchard Improvement Co. case was cited by this Court in the recent leading case, *Standard Oil Co. of California, et al. vs. United States,* 153 F. 2d 958 (9th C.C.A. 1946). In that case the United States brought an action against Standard Oil for wages paid to a soldier during disability and his hospital expenses caused by injuries received when he was struck by a truck of the defendant. The lower court allowed the recovery, but this Court reversed the holding.

> " * * * In *Crab Orchard Improvement Co. vs. Chesapeake & Ohio Ry.,* 4 Cir., 115 F. 2d 277, and *The Federal No. 2,* supra, 2 Cir. 21 F. 2d 313, it is held that in the absence of contractual or statutory right, the party paying wages and medical expenses is not entitled to subrogation or indemnification." 153 F. 2d 958, 963.

The final paragraph of the opinion succinctly refutes the contention of the Appellant that it has an action based upon indemnity without a statutory basis:

> "In our opinion authority for this action should come through legislation, and not from an attempt by the courts either to enlarge the scope of an ancient common law cause of action, or to create a new one." 153 F. 2d 958, 964.

On appeal to the Supreme Court, the case was affirmed. 332 U.S. 301, 67 S. Ct. 1604, 91 L. Ed. 2067. Justice Rutledge, speaking for the court, reiterates the proposition that a new cause of action should be based upon the legislation and not be created by the Judicial branch of the government:

> " * * * The only question is which organ of the government is to make the determination that

liability exists. That decision, for the reasons we have stated, is in this instance for the Congress, not for the courts. Until it acts to establish the liability, this Court and others should withhold creative touch." 332 U.S. 301, 316-317; 91 L. Ed. 2067, 2076; 67 S. Ct. 1604, 1612.

Appellant cites the case of *Travelers Insurance Company vs. Northwest Airlines, Inc.,* 94 F. Supp. 620 (U.S. District Ct., W. D. Wisc.). It appears to have a factual situation similar to that of this case. The Court's opinion which is the ruling on defendant's motion to dismiss, does not indicate whether a Pre-Trial Order had been entered or whether there had been an agreement between the parties as to the facts. It does appear that the action was filed the same year that the decedent was killed so no Statute of Limitations question was involved. If the opinion is authority for the proposition that a cause of action in favor of Travelers Insurance Company was created in addition to the liability created by the Wrongful Death Statute of Wisconsin, Appellees feel that the District Judge was in error. Appellees feel that this error is predicated on too general an interpretation of the text material in Corpus Juris Secundum and American Jurisprudence.

Comparing the Northwest Airlines case and our present case with the text material quoted by the District Judge the following discrepancies appear:

(1) Neither plaintiff was "exposed to liability" by the wrongful act of the defendant. No action could have been brought against the plaintiff on account of the wrongful act of the defendant. The liability of the plain-

tiffs was created by the contract of insurance they made with the respective employers and that liability existed whether the defendants were negligent or not.

(2) Neither plaintiff had to pay damages as a result of the death. Damages as a result of injury to the person or death are defined and limited by the law of the state where the injury or death occurs. The measure of damages which an injured person may recover, or which his successors in case of death may recover, is set by certain standards. The amount paid by the plaintiffs was fixed and set by a separate statute and has no connection with the damages which are recoverable in an action by the injured party or his successors in case of death. If either plaintiff had failed to make compensation payments to the widow and the widow had sued, the damages or her recovery would not necessarily have had a relation to the damages she would recover in an action against the wrongdoer. Finally an award to a widow or an injured employee of compensation payments gives no benefit to the defendants.

The Restatement of Restitution, § 76 contains a more accurate and specific definition of indemnity than that of other texts. The authors have apparently taken care to include in the definition the requisites of an action for indemnity:

> "§ 76. A person who, in whole or in part, has discharged a duty which is owed by him but which as between himself and another should have been discharged by the other, is entitled to indemnity from the other, unless the payor is barred by the wrongful nature of his conduct."

The crux of an action for indemnity is that the duty discharged by the plaintiff must be a duty that was owed by the defendant and that as a result of the discharge, the defendant has received a benefit. In this case, the duties of defendant to James Buie were to operate the truck in the manner prescribed by law and to pay damages to his estate as defined and fixed by the Oregon Wrongful Death Statute. The duty of plaintiff to the widow of James Buie was a duty created by the contract of employment, the statutes of the State of California, and by appellant's contract of insurance, and is a separate and distinct obligation from that of the defendants. The defendants received no benefit by reason of plaintiff discharging its obligation through the employer to the widow of James Buie. We have two separate and distinct obligations which are not related and the discharge of one does not discharge the other so that one of the parties is benefited by the fact that the other party makes a payment.

Finally, we call the Court's attention to a very recent work, "Subrogation Under Workmen's Compensation Acts", by William B. Wright. This work was published in 1948. The author has gone into the question of recovery by an employer or his insurance carrier for compensation and other payments made on account of injuries caused by a third party. The author has referred to many leading cases and covers the question quite thoroughly. At no place in the work does he refer to a cause of action based upon indemnity as the appellant is contending for here. We particularly direct the Court's attention to the following three sections:

"Sec. 4. The workmen's compensation acts do not create the legal liability of a third person for an injury or death of an employee. To the extent of the recovery allowed by the act, the common law action of the employee is preserved and the workmen's compensation act regulates who shall prosecute the action and specifies who shall be the recipient of the damages recovered. Whether insurer and employer can recover the amount of compensation payments from a third party depends on whether the injured employee, or, in death cases, his dependents, could have recovered against the third person if he had brought the suit for damages. The liability or the amount of liability of the tort-feasor causing the injury to the employee is not dependent upon the fact that compensation has been paid or awarded."

"Sec. 9. The question of the substantive right to recover at common law or under the death statutes against a tortfeasor whose act caused the injury or death, the nature of the right and the parties in whom it is vested is determined by the law of the place where the injury or death occurred. * * *"

"Sec. 10. As the action which the employee, employer or insurance carrier prosecutes is one at common law and not by virtue of a right that he acquires under the compensation act, the time in which the right to sue is prescribed is that set out in the Statute of Limitations or by the death statutes. So far as the third party tortfeasor is concerned the period during which suit may be brought is not usually lessened by the workmen's compensation act although provisions have been inserted in some acts requiring the employee to sue or elect to sue within a specified definite period upon penalty of having his cause of action assigned to his employer by operation of law. Under such provisions it has been held that the employee cannot sue after the cause of action has been assigned to his employer by operation of law, although it has also been held that the purpose of the requirement is to establish a definite arrangement between the employer and

the employee and the employer, if he sees fit, may waive the provisions and the matter is of no concern of the third party who has wrongfully injured the employee.

"By the weight of authority, neither the assignment nor subrogation extends the time in which the employer or the insurance carrier may institute proceedings against the third party and where the statute merely transfers to the person paying the compensation the same cause of action which the employee possessed, the new party must bring his suit within the time prescribed for the employee, the prescribed time running from the date of the injury or death and not from the date of the award of compensation or the date of the payment of compensation."

CONCLUSION

James Buie was operating an automobile on a highway in the State of Oregon. This automobile collided with a truck being operated by the Appellees through their agent. As a result of this accident, James Buie was killed. Plaintiff alleges that the defendants were negligent and that this negligence caused the death of James Buie. At this point, the tort, the wrongful act, if any, had been committed and had been committed in Oregon. Because of a contract of employment made in California, a contract of workmen's compensation insurance between Appellant and the employer and because of the statutes of the State of California, Appellant was required and is being required to make compensation payments to one Norma Buie.

It is an uncontradicted proposition that the law of the place where the tort is committed governs as to whether there will be a recovery and the extent of the recovery, if any. Goodrich on Conflict of Laws, 3rd Edition, Section 92, points out:

> "The general rule is that the creation and extent of tort liability is governed by the law of the place where the alleged tort was committed."

The same author on page 262 states:

> " * * * No case in this country has been found where recovery in tort has been allowed for what was not the basis of an action by the lex doci delicti."

In Section 102 of the same work, Goodrich states:

> "No action may be brought of injuries resulting in the death of a human being unless an action is given by the law of the state where the injury occurred."

In 16 American Jurisprudence, Death, we find the following observations which are so generally accepted that we feel further elaboration upon them will be unnecessary.

> "Sec. 389. RIGHT OF ACTION—It is established by the overwhelming weight of authority that the existence of a right of action for wrongful death must be determined by the law of the place where the fatal injury was inflicted."

> "Sec. 396. PARTIES—The general rule is that an action for wrongful death is maintainable only in the name of the person in whom the right of action is vested by the statutes of the state where the injuries resulting in death are inflicted."

> "Sec. 404. GENERALLY—The rule that the existence of a right of action for wrongful death and all other matters pertaining to the substantive right must be determined by the law of the place where the fatal injury was inflicted is not affected by the fact that another state was the locality of the entry into a contract of employment, or for transportation between the defendant and the deceased, or the locality where the negligence which caused the accident resulting in death occurred or the locality where the death occurred."

Section 8-903, Oregon Compiled Laws Annotated, as it read in 1947, the time of James Buie's death is as follows:

> "*Action by personal representatives for wrongful death: Limitations: Amount recoverable.* When the death of a person is caused by the wrongful act or omission of another, the personal representatives of the former for the benefit of the widow or widower and dependents and in case there is no widow or widower, or surviving dependents, then for the benefit of the estate of the deceased may maintain an action at law therefor against the latter, if the former might have maintained an action, had he lived, against the latter, for an injury done by the same act or omission. Such action shall be commenced within two years after the death, and damages therein shall not exceed $10,000."

Appellant makes no contention that any of its rights arise from the foregoing statute and in fact deny that the foregoing statute has anything to do with its cause of action for the very obvious reason that James Buie was killed in October, 1947 and the present action was not filed until two years and seven months later.

While Appellees were operating their truck in the State of Oregon, they were subject to certain common

law and statutory requirements as to the manner in which said truck was operated. They owed a duty to obey the traffic rules and to operate the truck in a careful and prudent manner. If they failed to follow said rules, they were negligent and if said negligence resulted in an accident, the Appellees were responsible to those who the law of the State of Oregon designates for protection from the tortious acts of the Appellees. It will need no more than brief mention to state that Appellees as they were operating their truck did not owe to the Maryland Casualty Company a separate, distinct and additional duty over and beyond the duties owed by Appellees to other persons using the highway. The proposition is so basic that Appellees will quote only Harper on Torts, Section 73:

> "Since negligence is a breach of the duty to use reasonable care, it appears that the duty to take this or that precaution will be owing to some definite person or class of persons, viz., those imperiled by the general type of risk or danger threatened. * * * "

If Appellant was attempting to claim some right which James Buie had, or some right which Norma Buie has, or the estate of James Buie has through subrogation or assignment, we would have a different proposition, but Appellant claims it has a separate cause of action and asks this Court to create in Appellant a cause of action on account of a contract made in California and statutes of California. If the legislature of California can create tort liability for a tort committed in Oregon or enlarge the tort liability for a tort committed in Oregon or extend the time in which an action must be

commenced for a tort committed in Oregon, the result would be chaos. The result would be that ever tort committed in one state would be subject to liability as defined and created by the legislature and courts of every other state in the union. This is not the law and woe to the legal profession if it ever should become the law.

It must be remembered that the Appellant, an insurance company, for a premium, probably paid in advance, undertook and agreed to pay compensation for injuries and death suffered by employees of Pacific Quaker Rubber Co., the employer of the deceased Buie. The Appellant does not contend and cannot contend that the Appellee ever received any consideration to be held liable in the event of an accident with the employee Buie. The only basis on which Buie could have recovered damages in the event of injury was under the laws of Oregon, and the only basis on which the Estate of Buie could have recovered damages was under Section 8-903 Oregon Compiled Laws Annotated. The statute is plain and specific and is the only statute in Oregon applying to the case at bar. Prior to the enactment of Section 8-903, there was no right of action in Oregon for wrongful death. We do not believe the legislature of the State of California, can enact a law, which sets aside the only statute of Oregon, giving a cause of action in the event of wrongful death.

As for the Appellant's contention that an action of indemnity will lie here, we state that in addition to the reasons set forth in the foregoing brief why this situation does not fit the requirements of an action for indemnity,

Appellant has asked this court to create a cause of action which has not heretofore existed under the laws of the State of Oregon. There is no legislative basis for the cause of action and there is no basis in the opinions of the Supreme Court of the State of Oregon for such an action. In fact, outside of the Staples case and the Northwest Airlines case, Appellees are convinced that no basis for the cause of action as set forth in this case can be found in any reported case or any text. As Justice Rutledge stated in *United States vs. Standard Oil Company:*

> " * * * Until it acts to establish the liability, this Court and others should withhold creative touch." 332 U.S. 301, 317; 91 L. Ed. 2067, 2076; 67 S. Ct. 1604, 1612.

Appellees respectfully submit that the District Judge was correct in his ruling and his dismissal of Appellant's case; and that Appellant's complaint does not state facts sufficient to constitute a claim either:

(A) on the basis of the law of the State of California, or,

(B) on the basis of an action for indemnity.

Respectfully submitted,

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